A

LING SWEE LIN

v.

PUBLIC FINANCE BHD & ANOR

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 12-14-2006-II]
25 MAY 2007

C ***CONTRACT:*** *Hire purchase - Liability of owner - Vehicle seized by police on suspicion of being stolen property - Whether hirer denied quiet possession of vehicle - Whether owner guilty of statutory conditions and warranties - Whether there was failure of consideration - Sum and instalments paid under agreement - Whether refundable - Hire Purchase*
D *Act 1967, ss. 7(1)(a), (b), (c) - Contracts Act 1950, s. 66*

The plaintiff/hirer had sought to purchase a vehicle from the first defendant/owner, and for the purpose had executed a hire purchase agreement ('the agreement') with the latter pursuant to
E the Hire Purchase Act 1967 ('HPA'). The vehicle was subsequently seized by the police on suspicion of being a stolen property, whereof the plaintiff terminated the agreement, discontinued the instalments and claimed for the refund of RM86,850 already paid to the first defendant under the
F agreement. The learned Sessions Court judge however dismissed the claim, ruling, in essence, that the first defendant, despite the seizure, could still give good title to the plaintiff during the agreed period of hiring. The dismissal of the plaintiff's claim apart, the learned judge also allowed the first defendant's counterclaim for
G the sum of RM152,470.18, being the sum remaining due from the plaintiff under the agreement. The plaintiff appealed and the primary issue that arose was whether, on the facts and in the circumstances, and bearing in mind the provisions especially of s. 7 of the HPA, the first defendant, as the owner/financier, was
H in breach of its statutory duty towards the plaintiff, as the hirer, and was hence duty bound to refund the plaintiff the said sum of RM86,850.

Held (allowing appeal and setting aside judgment of trial judge):

I

(1) The HPA recognizes certain conditions and warranties to be implied in every hire purchase agreement. Thus, under s. 7(1)(a) the owner gives a warranty that the hirer shall

have and enjoy quiet possession of the goods, whilst under s. 7(1)(b) there is an implied condition that the owner has the right to sell the goods at the time the property is to pass to the hirer. Likewise, under s. 7(1)(c) there is an implied warranty that the goods are free from any charge or encumbrance. Also, at common law, if this condition is not satisfied, there is a total failure of consideration such as to entitle the hirer to obtain a refund of all hire charges and instalments paid. (para 8)

(2) In the context of vehicles under the HPA, 'quiet enjoyment' includes possession and uninterrupted use by the hirer of the vehicle as ordinarily expected under the terms of hire purchase agreement. In this case, the hirer has lost possession of the vehicle (to the police) and the defendant was in no position to put the hirer into possession and in consequence is patently in breach of the statutory warranty. (para 8)

(2a) In a wider sense it can be said that s. 7(1)(a), (b) and (c) are inextricably interwoven to obtain a permanent status of 'quiet possession'. Since they are so inextricably interwoven, the 'quiet enjoyment' must attain the status of implied condition and nothing less. (para 8)

(3) Under s. 7 of the HPA, the financier must also be the true owner of the vehicle at the time of execution of the hire purchase agreement. Failing that, the agreement will be null and void as the financier will have nothing to let or sell under the law. (para 9)

(4) On the evidence, the first defendant was clearly not in a position to satisfy the requirements of s. 7 of the HPA with the result that the counterclaim should not have been allowed by the trial judge. For the same reason this court must allow the plaintiff's appeal and in the circumstances would order the first defendant to refund with interest the said sum of RM86,850. (paras 10-11)

Case(s) referred to:

Ahmad Ismail v. Malayan Motor Company & Anor [1973] 1 MLJ 117 ***(refd)***

Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 ***(refd)***

Helbey v. Mathews [1895] AC 471 ***(refd)***

A *Karflex Ltd v. Poole [1933] 2 KB 251* ***(refd)***
Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin [2001] 1 CLJ 768 HC ***(refd)***
MBF Finance Berhad v. Low Ping Ming [2005] 1 CLJ 305 CA ***(foll)***
Rowland v. Divall [1923] 2 KB 500 ***(refd)***
B *Warman v. Southern Counties Car Finance Corpn Ltd [1949] 2 KB 576* ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Criminal Procedure Code, s. 413
C Hire Purchase Act 1967, ss. 4, 7(1)(a), (b), (c), (2), (3), (4)
Sales of Goods Act 1957, ss. 12(2), (4), 14(c)

For the appellant/plaintiff - Yap Yau Sin; M/s Wan Junaidi & Co
KC Wong; M/s KC Wong & Assoc
For the 1st respondent/defendant - Leonard Shim (Wejok Tomik with him);
D *M/s Reddi & Co*
For the 2nd respondent/defendant - Wong Ho Leng; M/s Wong Ho Leng & Co

Reported by WA Sharif

E

JUDGMENT

Hamid Sultan Abu Backer JC:

F **[1]** This is my judgment in respect of the appellant's appeal against the judgment (after full trial) of the learned sessions judge dated 17 March 2006 who dismissed the appellant's/plaintiff's claim for refund of money under the hire purchase agreement and allowed the 1st respondent's/defendant's (original claim) claim for
G balance of the purchase price under the said agreement.

[2] In this case the appellant/plaintiff (hirer) had brought the action against the 1st respondent/defendant (financier) pursuant to a hire purchase agreement under the Hire Purchase Act (HPA
H 1967). The complaint of the appellant is that the 1st respondent has no title to the vehicle as it was a stolen property and is entitled to terminate the hire purchase agreement as the 1st respondent (financier) was in breach of s. 7(1)(b) of HPA 1967 and in consequence the appellant is entitled to refund of the sum
I under the hire purchase agreement. The defendant financier in the same suit had brought an action in the capacity of the financier

against the plaintiff in the original action and two other persons namely the Director of Jabatan Pengangkutan Jalan Malaysia Sarawak and Government of Malaysia and by a counter-claim against a third party, Lau Choo Ing, and as a result the title of the suit at the date of trial before the sessions court appeared as follows:

IN THE SESSIONS COURT AT KUCHING

IN THE STATE OF SARAWAK, MALAYSIA

SUMMONS NO. 52-233-2000-I

BETWEEN

LING SWEE LIN (BIC K 0219281)
No. 26, Lorong 13, Jalan Arang,
93250 Kuching, Sarawak ... PLAINTIFF

AND

PUBLIC FINANCE BERHAD (6471-U)
a company incorporated in Malaysia and
having its registered office at Tingkat Kelima,
Wisma Perdana, Jalan Dungun,
50490 Kuala Lumpur and having a branch office
at Ground Floor, Lot 142 & 149,
Jalan Abell, 93100 Kuching, Sarawak ... DEFENDANT

(by original action)

BETWEEN

PUBLIC FINANCE BERHAD (6471-U)
a company incorporated in Malaysia and
having its registered office at Tingkat Kelima,
Wisma Perdana, Jalan Dungun,
50490 Kuala Lumpur and having a branch office
at Ground Floor, Lot 142 & 149,
Jalan Abell, 93100 Kuching, Sarawak ... PLAINTIFF

AND BETWEEN

LING SWEE LIN (BIC K 0219281)
No. 26, Lorong 13, Jalan Arang,
93250 Kuching, Sarawak ... 1ST DEFENDANT

A DIRECTOR OF JABATAN PENGANGKUTAN JALAN MALAYSIA, SARAWAK ... 2ND DEFENDANT

GOVERNMENT OF MALAYSIA ... 3RD DEFENDANT

B (by counter claim)

The claim by the 1st respondent/defendant against the 2nd and 3rd defendants was, *inter alia*, for vicarious liability for misrepresentation and/or breach of statutory for giving wrong C particulars. Before the trial, the action against the 2nd and 3rd defendants was withdrawn leaving only the plaintiff, the defendant (financier) and 2nd respondent/third party. The 2nd respondent's counsel has informed the court the outcome of the appeal in respect of their client is only related to costs.

D **[3]** The plaintiff, inter alia, in the statement of claim says: (i) the plaintiff had pursuant to the said hire purchase agreement and the representations of the defendant that it was the owner of the said vehicle paid to the defendant an initial deposit and part payment E of RM48,000 and fifteen (15) monthly instalments of RM2,590 amounting to RM38,850 pursuant to the schedule to the said hire purchase agreement. (ii) the said vehicle was seized by the Royal Malaysian Police on 13 April 2000 on the ground that the said vehicle is stolen property. (iii) in view of the seizure of the said F vehicle by the Royal Malaysian Police, the defendant is no longer able to hire out the said vehicle to the plaintiff and/or deliver a good title of the said vehicle to the plaintiff as provided for in cl. 14 of the said hire purchase agreement and consequently the defendant would be in breach of said hire purchase agreement G and also s. 7(1)(b) of the HPA 1967 rendering the said hire purchase agreement void. (iv) alternatively, in view of the fact that the said vehicle is stolen property it follows that the said hire purchase agreement is null and *void ab initio*. (v) in the premise the defendant is required under s. 66 of the Contracts Act 1950 H to refund to the plaintiff the sum of RM86,850 (being deposit of RM48,000 and instalment payments of RM38,850). (vi) with interest at 7.75% per annum calculated from 4 May 2000 until the date of full and final settlement, including costs on a solicitor-client basis.

I **[4]** The learned sessions judge, *inter alia*, has summarised the facts/evidence and submission of the parties and state as follows:

The evidence adduced by the Plaintiff shows that on 13.4.2000, the Vehicle was seized by the Royal Malaysia Police on the ground that it was a suspected stolen property (see exhibits P2 and P3). Based on the letter at page 15 of Bundle D which authenticity and contents are agreed to by the parties, a week after the seizure i.e. on 20/4/2000, the Plaintiff instructed her solicitors to terminate the hire purchase agreement, stopped paying the installment and claimed for refund of the sum of RM86,850.00 paid toward the hire purchase loan. Neither the Plaintiff nor PW2 went personally to the police to check the status of the police investigation in respect of the Vehicle. Nor did they make any application to the police for the release of the vehicle. They instructed their lawyers to look into the case for them. They did not, however, instruct their lawyer to apply to the police or to the court for the release of the Vehicle.

DW4 Alexander Lao testified that the defendant conducted a search on the Vehicle at the JPJ, Sarawak, Kuching on 10.8.2000 after the seizure and it shows that the plaintiff is the registered owner of the Vehicle. (See Exhibit D15). On 24.8.2005, another search was conducted on the Vehicle at the JPJ, Sarawak, Kuching, and it shows that the plaintiff is still the registered owner of the Vehicle (see Exhibit D16). DW4 further testified that one Andrew ak. Martin was charged in the Magistrates Court at Kapit not for theft but forgery of the registration of the Vehicle. The said Andrew ak. Martin was discharged on 13.12.1994 (see Exhibit D14).

For the plaintiff it is argued that to date the Vehicle had not been returned to either the Plaintiff or the defendant. There is no evidence to show that the police was ready and willing to release the Vehicle to the Plaintiff or the defendant. The defendant as owner of the Vehicle has not shown that they had attempted to recover the possession of the vehicle from the police. The Hire Purchase Agreement between the Plaintiff and the defendant has become void as the Vehicle was seized by the police and has not since been returned to either party. As it is impossible for the defendant to pass a good title to the Plaintiff, the defendant has breached section 7(1)(b) of the Hire Purchase Act 1967 which goes to the root of the hire purchase agreement thereby entitling the Plaintiff to recover the amount already paid by her. The plaintiff relied on *Ehwan bin Saring*'s case, where the facts, it is said, are similar to the facts in this case except that in Ehwan bin Saring's case, the vehicle was forfeited by the Customs & Excise Department whereas in our case, the Vehicle was seized by the police.

On behalf of the defendant it is argued that the bare suspicion of stolen property has not been proven. The Plaintiff as the registered owner of the Vehicle had adduced no evidence to prove on the balance of probability that the Vehicle is a stolen property. The Plaintiff did not call the relevant police officer to enlighten the court on the issue of stolen property. An adverse inference, it is submitted, must be drawn against the plaintiff under section 114(g) Evidence Act, 1950 for such failure.

In reply, the plaintiff contended that even though the Plaintiff (the hirer) was the registered owner of the Vehicle, she was only in law the person who had possession and use of the car and this fact did not make her the legal owner [*Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn. & Anor* [1976] 1 MLJ 83]. The defendant is the absolute owner of the Vehicle for all intent and purpose. [*Industrial Resources Bhd v. United National Finance Ltd* [1987] 1 MLJ 513]. Consequently the defendant should be the party to prove on a balance of probability that they are in possession of the Vehicle and are able and willing to hand over possession and/or give a good and valid title to the Plaintiff in respect of the Vehicle if the Plaintiff were to exercise their option under the Hire Purchase Agreement. This, it is submitted, the defendant has failed to show. The plaintiff also relied on *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 MLJ 585 to support his contention that the burden is always on the person seeking to enforce the contract to show that the requirement of the section had been fulfilled.

[5] The appellant, *inter alia*, appeals to the High Court on grounds that the learned trial judge erred in fact and in law (i) in failing to make a finding that the plaintiff did not have and did not enjoy quiet possession of the vehicle upon the seizure of the vehicle by the Royal Malaysian Police and consequently the defendant was in breach of s. 7 of the HPA 1967; (ii) in finding that the defendant had not proven on a balance of probability that the vehicle is a stolen property and that the defendant is unable to deliver a good title in respect of the vehicle as the plaintiff have proven that the defendant is not in possession of the vehicle which is still with the Royal Malaysian Police and *prima facie* under the HPA 1967 the defendant did not have and could not deliver a good title to the plaintiff; (iii) in finding that the defendant had proven on a balance of probability that the defendant could give a good title to the plaintiff during the agreed period of hiring under the hire purchase agreement from 18 January 1999-18 December 2003 when the defendant had failed to adduce evidence that the defendant was in possession of

the vehicle and were able to hand over possession and/or allow the plaintiff to enjoy quiet possession and/or give a good and valid title to the plaintiff in respect of the vehicle; (iv) in finding that the plaintiff being the registered owner of the vehicle should apply to the Royal Malaysian Police under s. 413 of the Criminal Procedure Code; (v) in failing to make a finding that the defendant as absolute owner of the vehicle had failed to take any steps towards recovery of the vehicle seized by the Royal Malaysian Police and/or recover possession of the vehicle; (vi) in failing to consider that by virtue of the defendant's counterclaim, the defendant had proven on a balance of probability that the defendant are able and willing to hand over possession and/or give quiet possession and/or give a good and valid title including possession thereof to the plaintiff in respect of the vehicle; (vii) in allowing the defendant's counterclaim and entering judgment against the plaintiff in the sum of RM152,470.18 with interest and costs when the plaintiff as hirer did not and could not enjoy quiet possession of the vehicle which is an implied condition under s. 7 of the HPA 1967 and further when the defendant have failed to adduce any evidence on the compliance of s. 4 of the HPA 1967; (viii) in awarding cost to the third party to be paid by the plaintiff when it was the defendant who brought in the third party to the proceedings and the defendant has failed to establish its claim against the third party; (ix) in failing to apply and take into consideration relevant provisions of the HPA 1967; (x) in fact in taking into account irrelevant considerations and failing to give due weight to relevant considerations.

[6] There were a number of witnesses and the summary, *inter alia*, of the evidence are as follows: (a) PW1 was called to establish the fact that a hire purchase agreement was entered into between the parties in respect of the said vehicle and that the appellant/plaintiff relied fully on the 1st respondent/defendant to make the necessary search with all the relevant authorities and to establish that the said motor vehicle was seized by the police through no fault of the appellant/plaintiff and to show the appellant/plaintiff was denied quiet enjoyment of the said vehicle. (b) PW2 the husband of PW1 was called to corroborate and reinforce the evidence given by PW1. (c) DW1 was called to establish the opening of account by third party and that purchase consideration of the said motor vehicle was paid by the respondent/defendant into the said account. (d) DW2 was called

to establish the fact that third party came personally to withdraw money from account opened with respondent/defendant. (e) DW3 was called to corroborate DW2 and further to show that the respondent/defendant followed proper procedures for withdrawal by third party. (f) DW4 was called to testify that appellant/plaintiff never relied on the respondent/defendant to make the necessary search. (g) third party was called to establish fact that third party was not the owner of the said motor vehicle, and he did not sell the said motor vehicle to the appellant/plaintiff and he did not received any monies from the respondent/defendant.

[7] I have read the submission of the appellant and the 1st respondent in detail. They are lengthy and the arguments are not well focused; in consequence I do not wish to repeat them.

[8] The real issue to be decided in this appeal in my view is to decide whether there is a duty for the financier in a hire purchase agreement to ensure the vehicle which is going to be financed is free from encumbrances and lawfully can be transferred to the financer and thereafter to give good title to the hirer upon payment of the hire purchase instalments and/or dues. Because of s. 7 of HPA 1967 this case need not be decided too much on the facts relevant to the entering into the hire purchase agreement and the reasons for termination except for the fact that the financier has purportedly financed a vehicle which in evidence is shown to be a subject matter of stolen property and the fact that appellant/hirer has lost possession to the police and the 1st respondent/financier had not obtained possession from the police until the date of trial. My view is based on the following reasons:

(a) At common law, the owner of goods who lets them out on hire purchase impliedly warrants that he is the owner of the goods at the time the bailment takes place, and not necessarily at the actual moment of the signing of the agreement. (See *Karflex Ltd v. Poole* [1933] 2 KB 251). Thus in dealing with the HPA 1967 one may need to look at the common law, Contract Act 1950, Sales of Goods Act 1957 (SGA 1957) and other provisions of the law when the HPA 1967 is silent.

In *Helbey v. Mathews* [1895] AC 471, it was stated that a hire purchase agreement gives the hirer of the goods an option either to terminate the agreement or to purchase the goods. The title or right to the goods will always remain with the

owner until the option to purchase has been exercised by the hirer. However, under our Act the title or ownership of the goods will only pass to the hirer upon full payment as set out in the hire purchase agreement.

(b) Section 7(1) and (2) of HPA 1967 states as follows:

> 7. Conditions and warranties to be implied in every hire-purchase agreement.
>
> (1) In every hire-purchase agreement there shall be:
>
> (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;
>
> (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass;
>
> (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.
>
> (2) In every hire-purchase agreement there shall be an implied condition that the goods shall be of merchantable quality, but such a condition shall not be implied:
>
> (a) where the hirer has examined the goods or a sample thereof, as regards defects which the examination ought to have revealed; or
>
> (b) if the goods are second-hand goods and the agreement contains a statement to the effect that-
>
> (i) the goods are second-hand; and
>
> (ii) all conditions and warranties as to quality are expressly negative, and the owner proves that the hirer has acknowledged in writing that the statement was brought to his notice.

The HPA 1967 recognizes certain conditions and warranties to be implied in every hire purchase agreement, without prejudice to any other written law or rule of law whereby any condition or warranty is to be implied in any hire purchase agreement (See s. 7(4) of the Act). The implied conditions and warranties are set out in s. 7(1) to (3) of the Act. Section 7(1)(a) deals with warranty of quiet possession (See s. 14(b) of the SGA

A 1957). Section 7(1)(b) deals with condition as to title (See s. 14(a) of the SGA 1957). Section 7(1)(c) deals with warranty as to free from charge or encumbrance (See s. 14(c) of the SGA 1957). Under s. 7(1)(a) owner gives a warranty that the hirer shall have and enjoy quiet possession of the
B goods. Under s. 7(1)(b) there is an implied condition that the owner has the right to sell the goods at the time that the property is to pass to the hirers. At common law, if this condition is not satisfied there is a total failure of consideration which entitles the hirer to obtain a refund of all hire charges
C and/or installment payment as the case may be notwithstanding that he has been using the goods. In *Warman v. Southern Counties Car Finance Corpn. Ltd* [1949] 2 KB 576, it was stated that if at any stage the option to purchase goes, the whole value of the agreement to the hirer goes with it. Under
D s. 7(1)(c) there is an implied warranty by the owner that the goods are free from any charge or encumbrance in favour of any third party at the time when the property in the goods is to pass to the hirer.

E In *Ahmad Ismail v. Malayan Motor Company & Anor* [1973] 1 MLJ 117, there was a claim against the car dealer in respect of title. The court considered the implied condition that the owner has the right to sell the goods. The court made the following observation:

F

> in the circumstances there was indisputable evidence that the car was not in fact a stolen vehicle and as such there could be no question that the title could not pass to the plaintiff under section 6(1)(b) of the Hire Purchase Act or under section 14(a) of the Sale of Goods (Malay States)
G Ordinance, 1957 at the time when the property was to pass.

(c) In *Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 83, the court considered the
H ownership of the vehicle under a hire purchase agreement. The court made the following observations:

> (a) upon the true construction of the plaintiffs' agreement which was of a type to which the Hire Purchase Act applied, until the hirer had exercised his option to purchase
I the car by paying the total rentals and fulfilling all his obligations under the agreement, no property in the car

passed to the hirer; (b) even though the hirer was the registered owner of the car he was only in law the person who had possession and use of the car and this fact did not necessarily make him the legal owner of the car.

(d) The phrase 'quiet enjoyment' which appears in s. 7(1)(a) of HPA 1967 is not defined. The learned author's of *'A Concise Law Dictionary'* – 5th edn. in relation to landed property defines it as follows:

> The right of a grantee of property (and of any person deriving title from him) to enter upon and remain in enjoyment of the property without any lawful interruption or disturbance by or on behalf of the person conveying the property to him, or by, through, or under any person through whom the person conveying derives title, otherwise than by purchase for value (Law of Property Act, 1925, Sched. II, Part I).

It will naturally follow in the context of vehicle under HPA 1967 'quiet enjoyment' will include possession and uninterrupted use by the hirer of the said vehicle as ordinarily expected under the terms of hire purchase agreement. In this case the hirer has lost possession and the 1st respondent/defendant was in no position to put the appellant into possession and in consequence is patently in breach of the statutory warranty. This breach will not have taken place if the 1st respondent/defendant had good title notwithstanding at the time of the trial the 1st respondent name was endorsed as the owner in the vehicle registration card. Good title is an implied condition under s. 7(1)(a) and (b) and in almost all cases good title is a *'sine qua non'* for the hirer to enjoy 'quiet possession'. In a wider sense it can be said that s. 7(1)(a), (b) and (c) are inextricably interwoven to obtain a permanent status of 'quiet enjoyment'. Since they are inextricably interwoven the status of 'quiet enjoyment' in my view attains the status of implied condition and nothing less.

(e) At common law where a term is implied ordinarily the plaintiff will only entitled to damages for breach of the implied term. The position under the HPA 1967 may be otherwise for it is a statutory term, breach of which will entitle the plaintiff with various remedies not limited to damages.

(f) The term condition and warranty has been dealt with under the SGA 1957. A condition is a term essential to the contract. If there is breach of the condition by the seller, the buyer may reject the goods and claim damages. If the buyer is in breach, the seller may terminate the contract and claim damages. (See s. 12(2) of SGA 1957). A warranty is a term which is part of the contract but is not of such importance as a condition which is so essential for the enforcement of the contract. If there is a breach of warranty, the aggrieved party cannot terminate the contract but can claim damages only. Whether a term in a contract is a condition or a warranty depends on the construction of the whole contract and not necessarily because the parties have specially stated that as a condition or warranty (See s. 12(4) of SGA 1957). In some cases, it is often difficult to ascertain whether the particular term is a condition or a warranty and in consequence augment a plethora of cases in this area of the law. Whether the term stipulated is a condition or warranty may often be a subject of dispute. The courts have to look into the fact and intention of the parties before arriving at a decision. For example, if A had purchased 10 doors from B stipulating a term that it must be painted in black colour and A supplies the door painted in green colour. On the facts it may appear that the term is only a warranty. However, if there was proviso under the building laws that all doors must be black in colour or at the least it is an implied statutory term, it is more likely that the court will construe the term as a condition rather than a warranty. Section 14 of SGA 1957. That section states:

> In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:
>
> (a) an implied condition on the part of the seller, that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
>
> (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
>
> (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

This section relates to implied undertaking as to title and the protection to the buyer in respect of such undertaking as set out in the section. In *Rowland v. Divall* [1923] 2 KB 500, the buyer purchased a car from a purported seller and used it for several months. Subsequently, the buyer came to know the purported seller was not the true owner. The buyer had to return the car to the true owner. The court held that the buyer was entitled to recover the full price from the purported seller notwithstanding that the buyer had used the car for some months. In *Ahmad Ismail v. Malayan Motor Company & Anor* [1973] 1 MLJ 117, the court considered the implied condition that the owner has right to sell the goods. On the facts, the court made the following observations:

(a) The learned president was correct in holding that there had been a sale of the car from the first defendant.

(b) In the circumstances, there was indisputable evidence that the car was not in fact a stolen vehicle and as such there could be no question that the title could not pass to the plaintiff under section 6(1)(b) of the Hire Purchase Act or under section 14(a) of the Sale of Goods (Malay States) Ordinance, 1957 at the time when the property was to pass.

In *Lian Lee Motor Sdn Bhd v. Azizuddin bin Khairuddin* [2001] 5 MLJ 334, the car was sold to the plaintiff by a purported registered owner. However, the registration of the card was forged. The plaintiff sued the defendant for the refund, being the money had and received by the defendant as consideration for the said Toyota. On the facts, the court made the following observations:

(a) When the defendant sold the said Toyota to the plaintiff, there was an implied condition on his part, under s. 14(a) of the Sale of Goods Act 1957, that he had a right to sell the said Toyota.

(b) But there was a total failure of consideration; the plaintiff had paid the purchase price in order that he might get the said Toyota and he has not got it.

(c) The defendant did not have the right of possession to the said Toyota and could not consequently give it to the plaintiff.

A (d) The plaintiff has a right to sue for the price paid as money had and received on a total failure of the consideration.

(e) The magistrate was wrong in law in deciding that the plaintiff had no right to claim for the refund on the ground that the defendant had a good title to the said Toyota and
B that the plaintiff had failed to show that the defendant had acquired the title of the vehicle illegally or without proper inquiry or that he was not a purchaser in good faith.

[9] The facts of *Lian Lee Motor (supra)* to a large extent has
C some similarity to this case and the prayers sought by the plaintiff is also similar to that of that case except in this case the subject matter is one under the HPA 1967. Because it falls under the HPA 1967 the duty, responsibility and commitment of the financier is much more onerous than ordinary sale of goods. Under
D s. 7 of HPA 1967 the financier must be the true owner of the vehicle at the time of execution of the hire purchase agreement failing which the hire purchase agreement itself will in my view be null and void as the financer will have nothing to let or sell under the law. Support for my proposition can be garnered from the
E Court of Appeal decision in *MBF Finance Berhad v. Low Ping Ming (t/a Low Peng Enterprise)* [2005] 1 AMR 610, where Augustine Paul JCA (as he then was) asserted that for an agreement to be qualified as a valid hire purchase agreement, the appellant (in that case) must be the owner of the vehicle at the time of its
F execution.

[10] From the evidence and submission it is clear that the 1st respondent/defendant even at the date of trial was not in position to satisfy the requirement of s. 7(1)(a) and (b) of the HPA 1967 and in consequence the 1st respondent's counterclaim should not
G have been allowed by the learned sessions judge, and for the reasons stated above, I am inclined to allow the appeal of the appellant with costs and the 1st respondent to pay the costs of the appellant here and the court below with no order for costs against the 2nd respondent. If costs cannot be agreed the getting
H up fees for costs for this appeal should not exceed RM5,000.

[11] I hereby make the following orders.

I

(i) Judgment of the learned sessions judge dated 17 March 2006 is set aside with costs to the appellant in the court below to be paid by the 1st respondent/defendant with no order as to costs against the 2nd respondent/defendant.

(ii) The 1st respondent/defendant to pay the appellant/plaintiff the sum of RM86,850 with interest at 7.75% per annum from 4 May 2000 until date of judgment and thereafter interest at 7.75% from the date of judgment until date of realisation.

(iii) The counterclaim of the 1st respondent/defendant is dismissed with costs to the appellant/plaintiff in the court below with no order as to costs against the 2nd respondent/defendant.

(iv) The appeal is allowed with costs as stated above.